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In the Supreme Court of the United States

No. 73-6360

LIONEL R. WELLMAN and BETTIE WELLMAN,
Petitioners,

vs.

PACER OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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INDEX

Opinions Below 1
Jurisdiction 2
Question Presented 2
Constitutional Provisions Involved 3
Statement of the Case 3
Reasons Relied On for the Allowance of the Writ 5
Conclusion 10
Appendix A—Order of the Circuit Court A1
Appendix B—Opinion of the Supreme Court of Missouri A2
Appendix C—Dissenting Opinion in the Supreme Court of Missouri A13
Appendix D—Motion for Rehearing and Motion to Remand for New Trial A17
Appendix E—Order Denying Petition for Rehearing and for New Trial A32

Case Citations

Haehl v. *Wabash Railway Company*, (Mo. Sup., Div. One, 1893) 24 S.W. 737 6
Helis v. *Ward*, 308 U.S. 365 (1939) 10
Panjwani v. *Star Service & Petroleum Company*, (Mo. Sup., Div. Two, 1965) 395 S.W.2d 129 7
Saunders v. *Shaw*, 244 U.S. 317 (1916) 5, 8, 9, 10

Constitutional and Statutory Provisions Involved

Fifth Amendment of the Constitution of the United States 3, 5
Fourteenth Amendment of the Constitution of the United States 3, 5
28 U.S.C. §1257(3) 2

In the Supreme Court of the United States

No. .....

LIONEL R. WELLMAN and BETTIE WELLMAN,
Petitioners,

vs.

PACER OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Missouri entered on December 10, 1973.

The timely filed Motion for Rehearing and Motion to Remand for New Trial was overruled by Order entered on January 14, 1974.

OPINIONS BELOW

Order of the Sixteenth Judicial Circuit Court of Missouri, Division 15, overruling defendant Pacer Oil Company's Motion to set aside the verdict for plaintiffs and to enter a judgment in favor of defendant is appended hereto as Appendix A.

The opinion of the Supreme Court of Missouri by which it reversed the jury verdict and judgment of the trial court is unreported and is appended hereto as Appendix B.

The dissenting opinion by Judges J. P. Morgan, Seiler and Bardgett is as yet unreported and is appended hereto as Appendix C.

The Motion for Rehearing and Motion to Remand for New Trial and Suggestions in Support thereof was filed December 24, 1973, and is appended hereto as Appendix D.

The order of the Supreme Court denying the Motion for Rehearing and to Remand for New Trial was overruled January 14, 1974 and is appended hereto as Appendix E.

JURISDICTION

The final order and opinion of the Supreme Court of the State of Missouri was filed on December 10, 1973, reversing the jury verdict and judgment of the trial court. The Motion for Rehearing and to Remand for New Trial was filed December 24, 1973, and overruled January 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

1. May the Supreme Court of Missouri deprive petitioners of jury verdict and judgment by ruling on a theory or principle never before applied in Missouri and then deny petitioners the right to try their cause under the law as changed?

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use without just compensation." (Emphasis added)

FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added)

STATEMENT OF THE CASE

Petitioners suffered grievous injuries on the night of July 2, 1969, when they tried to make arrangements to have the damage to the hood of their car repaired.

The defendant's employee in charge, Kelly Gamble, who allegedly had failed to latch the hood, drew a gun and stated he would settle the matter then and there; the first shot ricocheted off the concrete drive of the station and grazed the left temple of petitioner Lionel Wellman; the employee Gamble then approached the car mumbling he would settle the matter now and pointed the gun down into the car and fired again; this time the slug struck the plaintiff in the right leg.

The cause was tried to a jury which returned a verdict for petitioner Lionel Wellman against defendant Pacer Oil Company in the amount of Forty-Two Thousand Dollars ($42,000.00) actual damages and Eighteen Thousand Dollars ($18,000.00) punitive damages and in favor of petitioner Bettie Wellman in the amount of Two Thousand Five Hundred Dollars ($2,500.00) actual damages and Two Thousand Five Hundred Dollars ($2,500.00) punitive damages. Judgment was entered by the trial court in the amounts of the verdict.

The Supreme Court of Missouri in a four to three Opinion filed December 10, 1973, reversed the judgment of the trial court by applying a theory or principle never before applied in Missouri (Appendix B, p. A6); three of the judges dissented, showing the judgment was valid under the doctrine of respondeat superior as it had existed in Missouri for more than eighty years (Appendix C).

Subsequently, these petitioners filed their Motion for Rehearing and Motion to Remand for New Trial to give petitioners the chance to try their cause under the law as changed (Appendix D). The Motion was overruled on January 14, 1974 (Appendix E).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Supreme Court of Missouri, in Contravention of the Law Set Forth in Saunders v. Shaw, 244 U.S. 317, 61 L.Ed. 1163 (1916), Deprived Petitioners of a Jury Verdict and Judgment by Ruling on a Theory or Principle Never Before Applied in Missouri and Then Denied Petitioners the Right to Try Their Cause under the Law As Changed, Thereby Depriving Petitioners of Due Process of Law in Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, by Refusing to Remand Petitioners' Cause for a New Trial, Thereby Denying the Petitioners the Right to Prove That Defendant Pacer Oil Company Knew or Had Reason to Know That Its Employee Was a Person of Violent Tendencies.

(a) As Judge Holman explained in the majority opinion, plaintiffs' judgment was taken from them by the application of a theory or principle that has not heretofore been applied in Missouri (Appendix B, p. A6).

The Supreme Court of Missouri reversed the judgment of the trial court by finding that the act of the employee in charge, Gamble, was outrageous and criminal and that the employer cannot be liable inasmuch as there was no evidence to indicate that the employer knew or had reason to believe that Gamble was a person of violent tendencies at any time prior to the occurrence in question. The court stated:

> "There was no evidence that Clarke or anyone connected with Defendant Pacer had any knowledge that Gamble carried a gun. There was also no evi-

dence to indicate that Pacer knew or had reason to believe that Gamble was a person of violent tendencies at any time prior to the occurrence in question.

No evidence was offered by Defendant." (Appendix B, p. A5)

and further on page 8 of the majority opinion the court stated:

"It should perhaps be noted that we are not here considering a situation where an employer knows that the employee has vicious propensities. There was no evidence of that kind in this case and hence, we need not consider the effect that would be given to such evidence in a proper case." (Appendix B, p. A10)

So saying, the Supreme Court of Missouri reversed the judgment of the trial court and, subsequently, overruled Plaintiffs' Motion for Rehearing and Plaintiffs' Motion to Remand for New Trial, which motion is appended as Appendix D hereto. The order of the Supreme Court denying the motion is appended hereto as Appendix E.

(b) The jury verdict and judgment in the trial court had been based upon the doctrine of respondeat superior as it had been expressed in Missouri as far back as 1893, when the Supreme Court of Missouri, in *Haehl* v. *Wabash Railway Company*, 119 Mo. 225, 24 S.W. 737 affirmed a verdict in favor of plaintiff, a trespasser, who was beaten, and then shot in the back of the head by a watchman for defendant railway company. The court stated:

". . . And it matters not in such a case whether the injury with which it is sought to charge him (the employer, respondeat superior) is a result of negligence, unskilled or wrongful conduct, for he must choose fit agents for the transaction of his business. . ." (24 S.W. at 741)

That court went on to state that the employer would be liable

> ". . . However wanton or malicious it was, the principal is liable if it was done in the course of the servant's employment. . ." (Ibid.)

This law was reinforced and confirmed in 1965 by the Supreme Court of Missouri in *Panjwani* v. *Star Service & Petroleum Company*, 395 S.W.2d 129, Sup. Ct. Mo. 1965, where the court stated:

> ". . . The overwhelming weight of authority supports the proposition, either expressly or by necessary implication, that an employer may be held responsible in tort under the doctrine of respondeat superior for an assault committed by his employee while acting within the scope of the employment, even though the latter acted wantonly, and contrary to the employer's instruction. 34 A.L.R.2d, 372, 396, Employer's Liability. . . for a personal assault upon customer, patron or other invitee. The Missouri cases following and applying this general rule are all collected in that annotation and it is not necessary to list them here. . ." (395 S.W.2d at 130)

and further,

> ". . . Plaintiff made a submissible case of the vicious, unprovoked assault and battery as plaintiff was engaged in trying to settle a controversy concerning a portion of defendant's business, on the premises, during working hours. . ." (395 S.W.2d at 131, 132)

All of this is confirmed by the dissenting opinion in the Supreme Court of Missouri appended as Appendix C.

(c) The petitioners could not foresee such a drastic change in the law by the Supreme Court of Missouri, while they were at the trial level.

The petitioners had, however, attempted to introduce evidence at the trial that defendant Pacer Oil Company would have hired employee Gamble even if it had known he was a convicted criminal, to say nothing of tendencies to violence. At the time of trial, evidence of this nature was excluded as is shown in Petitioners' Motion for Rehearing and Motion to Remand for a New Trial and Suggestions in Support thereof, appended as Appendix D. At the time of trial, this denial by the trial court was harmless error for such proof was not a necessary element to plaintiffs' case.

However, considering the law as changed, plaintiffs should have the opportunity to try their cause under the law as changed and to prove the knowledge of and attitude of defendant Pacer Oil Company in hiring and retaining this employee with violent tendencies.

In *Saunders* v. *Shaw*, 244 U.S. 317 (1916) this Court reversed a judgment entered by the Supreme Court of Louisiana which had reversed a lower court's opinion. The Supreme Court of Louisiana, in that case, had found that no evidence had been offered to rebut the plaintiff's evidence because the trial court had ruled the plaintiff's evidence inadmissible. This Court held:

> "He now brings this writ of error and says that he has been deprived the due process of law, contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically, this is true, for when the trial court ruled that it was not open to the plaintiff to show that

his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The Chief Justice and Mr. Justice O'Neill were of the opinion that the case should be remanded to the Trial Court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of Myles Salt Co. case that to remand it would be an empty form,—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." (l.c. 224 U.S. at 319)

This Court went on to state,

"The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course, ordinarily, that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here . . . It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing, the plaintiff in error brought the claim of constitutional right to the attention of

the Chief Justice of the State by his assignment of errors. We do not see what more he could have done." (l.c. 224 U.S. at 320)

The law as expressed in *Saunders* v. *Shaw* has been confirmed by this Court in *Helis* v. *Ward*, 308 U.S. 365, 84 L.Ed. 327 (1939), where the Supreme Court declined to order a new trial in a similar situation *only* because the petitioner failed to seek a new trial and the motion for rehearing. This Court, through Justice Douglas, clearly indicated that had the petition preserved the point, a new trial would have been granted.

CONCLUSION

For reasons as set out in this Petition, a Writ of Certiorari should issue to review the judgment of the Supreme Court of Missouri entered on December 10, 1973, and its denial of the right of Plaintiffs to try their cause under the law as changed.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SIXTEENTH JUDICIAL CIRCUIT FOR MISSOURI

No. 728,895

LIONEL R. WELLMAN and BETTIE WELLMAN,
Plaintiffs,

vs.

PACER OIL COMPANY, et al.,
Defendants.

ORDER

"Defendant Pacer Oil Company's Motion to set aside the verdicts for Plaintiffs and to enter judgment in favor of Defendant in accordance with its Motion for a directed verdict at the close of all the evidence is overruled.

Timothy D. O'Leary
Judge, Division 15

Dated this 4th day of March, 1971."

APPENDIX B

IN THE SUPREME COURT OF MISSOURI
EN BANC

No. 56,672

LIONEL R. WELLMAN and BETTIE WELLMAN,
(Plaintiffs) Respondents,

vs.

PACER OIL COMPANY,
(Defendant) Appellant.

Appeal from the Circuit Court of Jackson County
Hon. Timothy D. O'Leary, Judge

OPINION

This action arose out of an occurrence at a service station operated by defendant Pacer Oil Company when Allen Gamble, a station employee, shot Lionel Wellman (hereinafter sometimes referred to in the singular as plaintiff) inflicting serious injuries. Lionel filed suit against Gamble, Pacer, and Ben Clarke, the station manager, to recover for his injuries, and his wife Bettie joined in seeking a recovery for loss of services. Both plaintiffs also sought a judgment for punitive damages. Gamble defaulted and, at the conclusion of the evidence, the court directed a verdict for Clarke. The jury returned a verdict for Lionel against Pacer in the amount of $42,000 actual and $18,000 punitive damages, and in favor of Bettie in the amount of $2,500 actual and $2,500 punitive damages. The judgment is final as to Gamble. Pacer Oil Company (hereinafter referred to as defendant) has duly appealed. The notice of appeal having been filed prior to January

1, 1972, we have jurisdiction because of the amount in dispute. This case was first heard and submitted in Division One, but was thereafter transferred to Court en Banc by that division without the adoption of an opinion.

On July 2, 1967, plaintiff was a noncommissioned officer at Richards Gebaur Air Force Base located near Kansas City. Plaintiff testified that late in the afternoon of that day he took his family to a Kansas City park for a cookout; that during the process of cooking the food he drank four or five cans of beer; that they returned home at about 9:30 and he and his wife then went to visit her mother; that at about 10:30 p.m., he stopped at the service station at 18th and Paseo to obtain gasoline; that the attendant, Allen Gamble, serviced his car, including checking the oil; that he acted surly but did everything he asked him to do; that they left the station and about two blocks away the hood on his car "flew up"; that he couldn't get the hood to stay fastened so he tied it down and went back to the station so he could advise the attendant that he had damaged his hood; that his car was a 1961 Falcon which had been driven 70,000 miles.

Plaintiff further testified that when he returned to the station there were a number of cars waiting to be serviced; that he waited for a time and then went over to Gamble who was servicing another car and accused him of "messing up" the hood on his car and asked him to look at it and see if he could fix it; that Gamble denied damaging the car and became belligerent; that he pursued the matter for about two minutes, and determined that Gamble was not going to do anything and that he should "leave and come back tomorrow and see the manager"; that as he turned he heard his wife scream, "Don't shoot my husband"; that he did not recall a shot being fired then, but realized that he was stunned and dazed;

that he crawled around the front of his car and got in the driver's seat; that he then felt his temple and there was blood on his hand; that as he sat there trying to clear his head Gamble opened the door and shot him in the right leg; that just before the shot he had heard Gamble mumble, "I'll take care of this right now"; that he managed to get the car started, and started to drive to General Hospital but was stopped by a policeman who obtained an ambulance and he was taken to the hospital.

Mrs. Wellman testified that after her husband started talking with Gamble she saw that Gamble was getting "ruffled" and that she got out of the car intending to tell her husband to "come on and let's go"; that after she got out she saw her husband turn to leave Gamble, at which time Gamble pulled a gun; that she then screamed, "Don't shoot my husband" and that Gamble turned and fired a shot at him and her husband fell; that after her husband got back into the car Gamble approached and said, "I am going to settle this right now"; that Gamble then fired a shot into the car; that her husband then left in the car; that a policeman came up and took the gun from Gamble and took her to where their car was stopped at a stop light about a block away; that she then went with her husband in the ambulance to the hospital.

Another eyewitness, Mr. Pettijohn, was seated in his car waiting for service. His testimony was about like that of the plaintiff, except he said that after the two men had argued for a time plaintiff stepped forward towards Gamble, at which time Gamble stepped back and pulled his gun and told plaintiff he was going to shoot him.

Another witness was Galen Hemmering, a Kansas City police officer, who was driving by in his car when he

saw the argument between the two men. He stated that plaintiff put his hands up and shoved Gamble back "like he was fending someone off, and at that time I saw a pistol in the right hand of Mr. Gamble"; that he then pulled his car into the station; that as he left his car and was approaching plaintiff's car he saw Gamble open the car door and shoot plaintiff; that he took the pistol away from Gamble and then followed plaintiff's car a short distance to where it had stopped; that he radioed for an ambulance and had plaintiff taken to General Hospital.

Plaintiff received serious and permanent injuries to his leg which will not be detailed here because not material upon this appeal.

Plaintiff read certain admissions filed by James Rush, Vice President of Pacer Oil Company, and from the deposition of Clarke, the station manager. From these admissions it appears that Gamble was working the 10 p.m. to 8 a.m. shift that night; that he had no supervisor and thus was in charge of the station; that it would be his duty to hear complaints, although not necessarily to adjust them; that it was the duty of Clarke the manager, to hire and discharge employees; that Gamble was permitted to work about eight days after the shooting and was then discharged because of the shooting and for other reasons; that the employees of Pacer were not given any instructions one way or the other concerning the carrying of weapons during the time they were on duty.

There was no evidence that Clarke or anyone connected with defendant Pacer had any knowledge that Gamble carried a gun. There was also no evidence to indicate that Pacer knew or had reason to believe that Gamble was a person of violent tendencies at any time prior to the occurrence in question.

No evidence was offered by defendant.

The sole question presented upon this appeal is whether the trial court erred in overruling the motion of defendant for a directed verdict and its after-trial motion for judgment. It is the contention of defendant that no submissible case was made against it because Gamble's acts in shooting plaintiff were not within the scope and course of his employment. Obviously, if defendant is to be held responsible for the acts of Gamble on the occasion in question, it must result from the application of the principle of respondeat superior.

Many of the cases cited and discussed in the briefs deal with the question as to whether the business of the employer had been completed before the assault occurred and that, for that and other reasons, the assault was not inflicted with an intent to promote the business of the employer but was motivated by purely personal reasons of the employee, such as gratifying feelings of anger or resentment. We will not further pursue those questions because we have decided that this case should be ruled upon a theory or principle that has not heretofore been expressly applied in this state.

We have concluded that the actions of Gamble were so outrageous and criminal—so excessively violent as to be totally without reason or responsibility—and hence must be said, as a matter of law, not to be within the scope of his employment. In support of that ruling we approve certain statements in Restatement of Agency 2d, § 231, Comment *a*, as follows:

> "The fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment, since the master is not responsible for

acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result. The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do.

"A chauffeur, driving on an errand for his master, who knowingly drives on the left-hand side of the street or exceeds the speed limit, is still acting within the scope of employment. Likewise, a gardener using a small stick in an assault upon a trespassing child to exclude him from the premises may be found to be acting within the scope of the employment; if, however, the gardener were to shoot the child for the same purpose, it would be difficult to find the act within the scope of employment. So, if a servant is directed to use any lawful means to overcome competition, the bribery of employees of the competitor or the circulation of malicious stories, might be found to be within the scope of employment, while the murder of the competitor, although actuated solely by zeal for the master, would not be."

Also, in § 235, in Comment c, it is said:

"*Outrageous acts.* The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business. * * * In such cases, the facts may indicate that the servant is merely using the opportunity afforded by the circumstances to do the harm. Hence, unless the principal has violated a personal duty to the person injured, or unless he becomes liable because of the nature of the instru-

mentality entrusted to the servant (see §§ 212-214), he is not liable for such acts.

"Illustration: 4. A is employed to eject trespassers. A boy of four seeks to enter the premises. A could easily prevent the child from so doing by calling to him. Instead, he shoots at the child and kills him. This evidence indicates that A was not actuated by an intent to perform his master's business and hence that his act was not within the scope of his employment."

Our foregoing decision is supported by a number of cases decided by the courts of other states. In Howard v. Zaney Bar, 85 A. 2d 401 (Pa. 1952), a bartender shot a customer who was annoying a female patron. It was held that he was not acting within the scope of his employment even though he had been instructed to maintain order. In so ruling the court stated:

"It was the duty of the bartender to maintain order. To perform this duty, inherently the bartender was authorized to use all *reasonable* means to maintain an orderly establishment. In keeping and maintaining order he was no doubt furthering the business of his employer. And in using any reasonable means to secure order he was acting within the scope of and in the course of his employment. * * * However, when the bartender * * * pulled out a gun and shot plaintiff, the bartender then departed from the scope of his employment. Such a use of violence under these circumstances is shocking and a gross abuse of all authority the bartender possessed to maintain order. * * * The disorder, if any, was so insignificant and the use of violent force so excessive and dangerous * * * that we are compelled *as matter of law* to

absolve defendant of vicarious liability." 85 A. 2d l.c. 492.

In Potter Title & Trust Co. v. Knox, 113 A. 2d 549 (Pa. 1955), a cab driver fired at a group of strikers who had made some remarks to him, and killed a bystander. In holding that the employer was not liable the court stated:

> "In the present case there was obviously no need for Allen, the taxicab driver, to protect himself. The testimony indicates that none of the strikers possessed or used firearms. * * * and not one of the men on the corner made a move to leave the sidewalk, to approach Allen in his taxicab, or to molest him in any manner. Moreover, he was already on his way when he fired at the group behind him—a criminal act for which he was properly indicted and convicted. It was an act wholly unauthorized by his employers—the kind of an act which the law, in one of its rare drolleries, terms a 'frolic' of his own." 113 A. 2d l. c. 552.

The rule here involved is also followed in another Pennsylvania case, i.e., Lunn v. Boyd, 169 A. 2d 103 (1961).

The Restatement rule was followed in Adami v. Dobie, 440 S. W. 2d 330 (Tex. 1969), wherein an agent who was authorized to look after the land and keep the gates closed shot and killed a person who left a gate open. In holding that the principal would not be liable the court stated that "[a] master is not liable for unauthorized intended tortious conduct of his servant, even when the act was done in connection with the servant's employment, where the wrongful act was unexpectable, in view of the duties of the servant. * * * The commission of a deadly assault is not a customary way of performing a duty which

involves seeing 'about the gates being closed.'" 440 S. W. 2d l.c. 334.

Our view is also supported by Strawder v. Harrall, 251 So. 2d 514 (La. App. 1971). There, a filling station employee shot a customer, who was buying a package of cigarettes, for an inconsequential reason. The court, in holding that the master was not responsible, stated that "the trial judge has properly applied the law in accordance with the evidence before the court, and Harrall's employer, Jefferson Oil Company, cannot be held liable on this account for his intentional wrong * * *. Although Harrall had been in the process of selling a package of cigarettes, clearly a duty with which he was charged, his act of procuring the shotgun and shooting the minor boy amounted to a departure from the scope of his authority, which was in no way associated with the responsibilities devolving upon Harrall." 251 So. 2d l.c. 516. To like effect is another filling station case, i.e., Martin v. Jones, 4 N. W. 2d 686 (Mich. 1942). Another supporting case is Lombardy v. Stees, 290 P. 2d 1110 (Colo. 1956).

It should perhaps be noted that we are not here considering a situation where an employer knows that the employee has vicious propensities. There was no evidence of that kind in this case and hence we need not consider the effect that would be given to such evidence in a proper case.

In contending that the trial court ruled correctly in overruling the motion for a directed verdict plaintiffs have cited the following cases: Barger v. Green, 255 S. W. 2d 127 (Mo. App. 1953), Bova v. St. Louis Public Service Co., 316 S. W. 2d 140 (Mo. App. 1958), Haehl v. Wabash R. Co., 24 S. W. 737 (Mo. 1893), Panjwani v. Star Service & Petr. Co., 395 S. W. 2d 129 (Mo. 1965), and Simmons v. Kroger Grocery & Baking Co., 104 S. W. 2d 357

(Mo. 1937). In view of the theory upon which we have decided this case, most of those cases are not applicable. However, we think we should discuss the Haehl and Panjwani cases. *Haehl* was a wrongful death action in which a man was shot and killed by a bridge watchman employed by the railroad. At the time of the shooting the watchman was in the act of causing decedent to leave the bridge. Although the watchman was engaged in the performance of his duties, the shooting was entirely unnecessary as the decedent was in the act of complying with his command to leave the bridge. It was held that the watchman was acting within the scope of his employment and plaintiff was permitted to recover. It may be that *Haehl* is distinguishable from our decision in this case on the theory that the railroad should have anticipated that their watchman might use unnecessary violence in the performance of his duties. There are certain statements in the opinion, however, that are not in accord with the views we have heretofore expressed. For example, it is stated that "it was not necessary, to render the defendant liable, that it should have authorized its watchman to kill the deceased, or sanctioned the deed after it was done; and, however wanton or malicious it was, the principal is liable if it was done in the course of the servant's employment." 24 S. W. l.c. 741.

In *Panjwani*, the filling station attendant became angry when plaintiff bought only one dollar's worth of gasoline and requested additional service such as checking the oil and tires. When plaintiff refused to leave without such service the attendant struck him in the face with the nozzle of a pump hose inflicting severe injuries. On appeal this court held that a submissible case was made against the employer under the doctrine of respondeat superior. While the facts in Panjwani differ from those in the case at bar, we note that the opinion approves a statement similar to

that heretofore quoted from *Haehl*. To the extent that the decisions and statements in Haehl and Panjwani (or any other decisions of our appellate courts) conflict with the views heretofore expressed, they should no longer be followed.

For the reasons heretofore stated, the judgment against appellant Pacer Oil Company is reversed.

Lawrence Holman,
Judge

Donnelly, C.J., Henley, and Finch, JJ., concur; Morgan, J., dissents in separate dissenting opinion filed; Seiler and Bardgett, JJ., dissent and concur in separate dissenting opinion of Morgan, J.

APPENDIX C

IN THE SUPREME COURT OF MISSOURI
EN BANC

No. 56,672

LIONEL R. WELLMAN and BETTIE WELLMAN,
(Plaintiffs) Respondents,

vs.

PACER OIL COMPANY,
(Defendant) Appellant.

DISSENTING OPINION

I respectfully dissent, because of my belief that the law that has been established and applied in Missouri for many years, pertaining to the problem posed in this case, lends itself more readily to reaching a logical and fair result than can ever be attained after adding the "foreseeability" test, advanced in Restatement of Agency 2d, § 231, and now adopted by the majority opinion.

In Haehl v. Wabash R. Co., 119 Mo. 325, 24 S.W. 737 (1893), this court adopted what it considered to be a "lucid statement of the principle of liability" with which we are now concerned, to-wit:

> "'The principle of respondeat superior applies only when what is complained of was done in the course of the employment. The principal is responsible, not because the servant has acted in his name or under color of his employment, but because the servant was actually engaged in and about his business, and carrying out his purposes. He is then responsible, because the thing complained of, although done through the

agency of another, was done by himself; and it matters not in such case whether the injury with which it is sought to charge him is the result of negligence, unskillful or of wrongful conduct, for he must choose fit agents for the transaction of his business. But if his business is done, or is taking care of itself, and his servant, not being engaged in it, not concerned about it, but impelled by motives that are wholly personal to himself, and simply to gratify his own feeling of resentment, whether provoked or unprovoked, commits an assault upon another, when that has and can have no tendency to promote any purpose in which the principal is interested, and to promote which the servant was employed, then the wrong is the purely personal wrong of the servant, for which he, and he alone, is responsible.' "

Thereafter, after determining that the employee's act fell within the principle noted, the court declared at l.c. 741, that ". . . however wanton or malicious it was, the principal is liable if it was done in the course of the servant's employment."

Recently, this court considered the same problem in connection with a factual situation almost identical to that here in Panjwani v. Star Service & Petroleum Company, 395 S.W. 2d 129 (1965), and therein said:

"The appellants, as manager and owner, do not challenge the general rule that for an assault and battery by an acting manager their customer may recover both actual and punitive damages; 'the overwhelming weight of authority supports the proposition, either expressly or by necessary implication, that an employer may be held responsible in tort under the doctrine of respondeat superior for an assault committed

by his employee while acting within the scope of the employment, even though the latter acted wantonly, and contrary to the employer's instruction.' 34 A.L.R. 2d 372, 396, 'Liability of employer * * * for a personal assault upon customer, patron, or other invitee.' The Missouri cases following and applying this general rule are all collected in that annotation and it is not necessary to list them here."

Thereafter, it was ruled, l.c. 131[2], that ". . . plaintiff made a submissible case of a vicious, unprovoked assault and battery 'as plaintiff was engaged in trying to settle a controversy concerning a portion of defendants' business, on the premises, during working hours. . .' "

In the instant case, as was true in both *Haehl* and *Panjwani,* the incident that gave rise to the employee's violent and criminal act was an incident attendant to the employer's business. Necessarily, the majority opinion does not find the facts otherwise.

From all of which, it may be fairly stated that heretofore the courts of Missouri have resolved similar cases by determining one ultimate question, i.e., was the employee acting within the scope of his employment?

Adoption of the "foreseeability" test will not avoid resolving the question as to whether or not the employee acted within the scope of his employment but will add another factor, i.e., did the employee commit a "minor" crime or a "serious" crime against the customer? I would submit that if the act is done within the scope of employment—the basis for the respondeat superior doctrine—it is unimportant how the action of the employee might be classified. It would not be facetious to suggest that adding the latter factor would justify a conclusion that an employer would be liable if the employee hit a customer

with his left hand (assumed to be a "minor" crime) but would not be if the employee clobbered the customer with his right hand (assumed to be a "serious" crime).

Furthermore, the "foreseeability" test is logically more applicable to a claim premised on a theory that the employer failed "to exercise ordinary care in employing a proper servant," Priest v. F.W. Woolworth Five & Ten Cent Store, 228 Mo. App. 23, 62 S.W. 2d 926, 928 [4], than it is to a claim based on a theory of respondeat superior.

Finding no persuasive or compelling reason for Missouri to abandon the reasoning followed by a majority of the states, I would affirm the judgment and necessarily must dissent.

J. P. Morgan
Judge

APPENDIX D

IN THE SUPREME COURT OF MISSOURI
EN BANC

No. 56,672

LIONEL R. WELLMAN and BETTIE WELLMAN,
(Plaintiffs) Respondents,

v.

PACER OIL COMPANY,
(Defendant) Appellant.

MOTION FOR REHEARING

MOTION TO REMAND FOR NEW TRIAL

This Motion is respectfully submitted in hopes of preventing manifest injustice; we sincerely pray that it be reviewed and given consideration. It is presented under two Counts.

I.

The purpose of this Motion for Rehearing is to call attention to material matters of law and fact overlooked or misinterpreted by the Court, as shown in its Opinion, all as provided in Rule 84.17 of the Supreme Court Rules of Civil Procedure. As grounds for its Motion for Rehearing, Plaintiffs state the following, which points are more fully set out and covered in the Suggestions attached hereto.

(a) Plaintiffs' judgment was attained under and by the law of this State as it had existed for more than eighty years.

(b) As a matter of public policy in Missouri, Plaintiffs, individuals in society, were entitled to recover their economic and social loss when, as invitees on Defendant's premises, they sustained serious injury because of the violent act of Defendant's employee done in the course of his employment.

(c) The Court's Opinion is based upon the erroneous conclusion that there is no evidence to indicate that Pacer knew or had reason to know that its employee Gamble was a person of violent tendencies.

(d) The Majority Opinion, making a conclusion as a matter of law, is based upon cited authority that provides that the "outrageous act" is *considered in determination of* the question of fact. That is, the type of authority cited is more suited to sustain a jury verdict in favor of Defendant employer than as authority to conclude a question of fact as a matter of law.

(e) The Court's Opinion is based upon application of law that permits an employer to escape responsibility for an outrageous act of an employee resulting in serious injury to an individual in society, even though the employment is continued thereafter and even though the jury has found the act to be done in the scope and course of employment.

WHEREFORE, Plaintiff asks the consideration of this Court, that the Opinion as expressed by three of the justices in the Minority Opinion be made the Majority Opinion or, in the alternative, that this case be remanded for new trial so that the Plaintiffs be granted the opportunity to introduce evidence with knowledge of all of the elements required.

II.

For its Motion to Remand for New Trial, Plaintiffs state the following, all as more fully set out in the Suggestions attached hereto.

(a) The Plaintiffs can produce evidence that Defendant Pacer knew or had reason to know that its employee Gamble was a person of violent tendencies.

(b) To prevent manifest injustice so that Plaintiffs will not be deprived of life, liberty, or property, without due process of law as provided by the law of the State of Missouri and in Article I, Section Ten of the Constitution of the State of Missouri.

(b) To prevent manifest injustice so that Plaintiff will not be deprived of life, liberty, or property, without due process of law as required by the Constitution of the United States, Amendments Fifth and Fourteenth thereof.

WHEREFORE, Plaintiffs ask the consideration of this Court and move that this case be remanded for a new trial so that the Plaintiffs be granted the opportunity to introduce evidence with knowledge of all of the elements as now required by this Court.

Reeder, Griffin, Dysart & Taylor, P.C.
By /s/ Roger W. Penner
1221 Baltimore Avenue
Kansas City, Missouri 64105
221-1464

Meyer, Smith, Bott & Perkins
By /s/ Joseph B. Bott
415 Argyle Building
Kansas City, Missouri
VI2-1490
Attorneys for Plaintiffs, Respondents

CERTIFICATE OF SERVICE

It is hereby certified that Defendant was served these Motions by delivering two copies thereof, with Suggestions, at the offices of Attorney for Defendant, Jack Kilroy, of the firm Shughart, Thomson & Kilroy, 914 Commerce Building, 922 Walnut, Kansas City, Missouri 64106, Attorney for Defendant, Appellant, on this 21st day of December, 1973.

/s/ Roger W. Penner

IN THE SUPREME COURT OF MISSOURI
EN BANC

No. 56,672

LIONEL R. WELLMAN and BETTIE WELLMAN,
(Plaintiffs) Respondents,

v.

PACER OIL COMPANY,
(Defendant) Appellant.

Suggestions in Support of Motion for Rehearing and in Support of Motion for a Remand for a New Trial

I.

For its Suggestions in Support of Motion for Rehearing, Plaintiffs respectfully submit the following and to call attention to material matters of law and fact overlooked or misinterpreted by the Court, as shown by its Opinion.

First off, it must be recognized that the Plaintiffs made a submissible case of a vicious, unprovoked assault and battery as the Plaintiff was engaged in trying to settle controversy concerning a portion of Defendant's busi-

ness, on the Defendant's premises, during working hours, the injuries being inflicted by the employee in charge.

Further, it must be recognized that it has been the law in the State of Missouri for more than eighty years that, under the principle of respondeat superior, the employer must choose fit agents for the transaction of his business. That law was clearly stated in *Haehl* v. *Wabash Railway Company* in 1893 (119 Mo. 325, 24 S.W. 727) and confirmed as recently as 1965 by the Supreme Court in *Panjwani* v. *Star Service & Petroleum Company*, 395 S.W.2d 129. Implicit in these decisions, and in every other decision in the State of Missouri involving this question, is a matter of public policy in the State of Missouri by which individuals in society were entitled to recover for their economic and social loss when, as invitees on Defendant's premises, they sustained serious injury because of violent acts of Defendant's employee done in the course of his employment.

In its Majority Opinion, the Court stated that this case should be ruled upon a theory or principle that has not been applied in this State before, namely, the "Outrageous Act Theory" as expounded by Defendant Pacer Oil Company. In support of this, the Majority Opinion quoted from the Restatement of Agency 2d §231, Comment *a*, as follows:

> "The fact that the servant intends a crime, especially if the crime is of some magnitude, *is considered* in determining whether or not the act is within the employment. . ." (Emphasis added)

And further, from §235, Comment *c*,

> "*Outrageous acts.* The fact that an act is done in an outrageous or abnormal manner *has value in indicating* that the servant is not actuated by an intent

> to perform the employer's business. . . . In such cases, the facts may *indicate* that the servant is merely using the opportunity afforded by the circumstances to do harm. . ." (Emphasis added)

In short, the Majority Opinion, concluding as a matter of law, is based upon cited authority that provides that the outrageous act *is considered* in determination of a question of fact; that is, in determining whether the act was done in the scope and course of employment or for personal gratification. The type of authority cited is more suited to sustain a jury verdict for Defendant employer than as authority to conclude a question of fact as a matter of law. Indeed, some of the cases cited as authority were cases in which the jury had found for Defendant.

The Court's Opinion, as it now stands, is based upon the application of a law that permits an employer to escape responsibility for an outrageous act of an employee resulting in serious injury to individuals in society, even though the employment is continued thereafter. The Court observes that this conclusion and opinion is reached as a matter of law under the facts of this case including,

> "There was no evidence that Clarke or anyone connected with Defendant Pacer had any knowledge that Gamble carried a gun. There was also no evidence to indicate that Pacer knew or had reason to believe that Gamble was a person of violent tendencies at any time prior to the occurrence in question." (Page 4 of Opinion)

and

> "It should perhaps be noted that we are not here considering a situation where an employer knows that the employee has vicious propensities. There was no

evidence of that kind in this case and hence, we need not consider the effect that would be given to such evidence in a proper case." (Page 8 of Opinion)

The effect of this Opinion is to deprive an ordinary individual in society from recovering the award the jury gave after hearing the evidence. Included in the evidence was the fact that the employer in charge of the filling station that night, Gamble, stated that he was going to "settle this right now" and, that even after learning of the shooting (the Defendant learned of the shooting the next morning), they, the Defendant employer, kept Gamble on as an employee in the same capacity for over two weeks after the shooting. The jury also heard that the employer had no rule one way or the other about the carrying of guns.

Now what the jury was prevented from hearing is shown in the transcript, page 240 concerning the attitude of the employer on this very subject.

"Mr. Kilroy: 'The other remaining one in that deposition, we object to page 31, lines 9 through 15, which is the only part of 31 which Plaintiffs had indicated he was going to read and is on the same subject.'

The Court: 'That objection is sustained.'

Mr. Penner: 'We offer it for the same reason. While we are there, we offer in addition to that, page 30, lines 9 through 14 in which I asked the manager Clarke, (reading) 'I simply asked, had you known of any previous criminal conviction on the part of Gamble, would you have gone ahead and hired him anyway?' And the answer by Clarke, (reading) 'Yes, I believe I would have. I liked his personality, like I stated before.'

Mr. Kilroy: 'This hasn't been brought to my attention before. We object for the reason it is immaterial to the issues and is outside of the pleadings and has no probative value.'

The Court: 'I'll sustain the objection.'

Mr. Penner: 'In addition to that on the same point, we offer on page 29, lines 14 through 16, (reading) 'Did you ever hire people who had convictions, criminal convictions?' And the answer, by the manager, Clarke, (reading) 'Yes, I do.'

Mr. Kilroy: 'Let the record show I object to that as being outside the pleadings, outside the issues and is not material and having no probative value.'

The Court: 'The objection is sustained.' "

The plain fact is that the jury found that this act by the employee Gamble was done in the course of employment. They did so by the applicable instructions as set out in MAI. The Court now, states that the act is too criminal and outrageous and that there is no showing that the Defendant knew or had any reason to believe any such propensity. We respectfully submit that the propensity of the employee should have been known or there should have been reason to believe such propensity and we could have proved it had we been permitted to do so.

We submit that the excluded evidence speaks for itself and when taken into consideration with the rest of the evidence can leave only one conclusion relative to this vicious act inflicted upon an individual in society. In other words, by the testimony and the portion of deposition excluded from evidence, the jury would have known the plain fact that this employee would have been hired whether or not he had been *convicted* of a crime (let

alone propensity to crime). This plain fact is further reenforced from the evidence that was admitted, namely, when they did learn of this "vicious and criminal" act, they, the Defendant, kept their employee on for about two weeks in the same capacity. They finally let him go for various reasons, including shortage in accounts.

WHEREFORE, we respectfully ask, to prevent manifest injustice to the Plaintiffs under the facts in evidence and the facts wrongfully excluded from evidence, that a rehearing be granted for the purposes of giving consideration to establishing the dissenting opinion as the opinion of this Honorable Court. Or, in the alternative, a new trial, so that the evidence excluded by the trial court may be introduced to show that the Defendant knew or should have known of the danger of employment of the policy of hiring convicted criminals. The law is stated in *Haehl* v. *Wabash Railway Company* since 1893 that the employer "Must choose fit agents for transactions of his business". The *Haehl* case was a respondeat superior case and surely such a duty must abide with the employer under the real facts as they existed in this case.

We respectfully ask and pray the consideration of this Court.

II.

Suggestions in Support of Motion to Remand for New Trial

Until this Opinion written by Judge Holman, the employer was liable, under the principle of respondeat superior, when the act was done in the course of employment. This has been the law in the State of Missouri for more than eighty years and as stated in *Haehl* v. *Wabash Railway Company*, 119 Mo. 325, 24 S.W. 727, Sup. Ct. 1893,

". . . And it matters not in such a case whether the injury with which it is sought to charge him (the employer respondeat superior) is a result of negligence, unskilled or of wrongful conduct, *for he must choose fit agents for the transaction of his business....*" (Emphasis added)

That Court went on to state that the employer would be liable

". . . However wanton or malicious it was, the principal is liable if it was done in the course of the servant's employment." l.c. 741

This law was reenforced and confirmed in 1965 by the Supreme Court in *Panjwani* v. *Star Service & Petroleum Company,* 395 S.W.2d 129, Sup. Ct. of Mo. (1965),

". . . The overwhelming weight of authority supports the proposition, either expressly or by necessary implication, that an employer may be held responsible in tort under the doctrine of respondeat superior for an assault committed by his employee while acting within the scope of the employment, even though the latter acted wantonly, and contrary to the employer's instruction. 34 A.L.R.2d 372, 396, Employer's Liability . . . for a personal assault upon customer, patron or other invitee. The Missouri cases following and applying this general rule are all collected in that annotation and it is not necessary to list them here."

and further

". . . Plaintiff made a submissible case of a vicious, unprovoked assault and battery as plaintiff was engaged in trying to settle a controversy concerning a portion of defendant's business, on the premises, during working hours . . ." l.c. 131, 132

In other words, Plaintiffs' case was tried under the law as it had existed in Missouri for more than eighty years. Only now is the jury's verdict, granting recovery for substantial damages suffered, taken away by the application of a theory of principle that has not heretofore been applied in this State.

The Court finds that the act was outrageous and criminal and the employer cannot be liable inasmuch as there was no evidence to indicate that the employer knew or had reason to believe that Gamble was a person of violent tendencies at any time prior to the occurrence in question. We state that there is such evidence, not only was there the admissions that were excluded but there was other evidence based in part upon the evidence that was excluded. The point is, there is evidence that Pacer knew or had reason to know of the violent tendency.

We respectfully submit that, this new and added element being applied for the first time in Missouri, the Plaintiffs must at least have the opportunity to try their case with knowledge of all of the elements that will be required of them. Previous to the Opinion as written by Judge Holman, knowledge of vicious propensity or conviction of crime was not an element of proof of liability under respondeat superior for the employer "must choose fit agents for the transaction of his business", *Haehl* v. *Wabash Railway Company,* above cited.

To deprive Plaintiffs of the property right of recovery for the serious injuries inflicted by the employee of Defendant Pacer Oil Company in the course of his employment, because of the application of a new principle never before applied, would be arbitrary and a deprivation of and a taking of property without due process of law.

Even in cases where the plaintiff submitted under the wrong theory of law (to say nothing of new law never before applied) the Courts in the State of Missouri, in the furtherance of justice, provide that a judgment for a plaintiff should not be reversed without remanding unless the Court is convinced that recovery cannot be had. See *Freese* v. *Kellison*, 482 S.W.2d 538 where the plaintiff erroneously submitted under a humanitarian doctrine and the Court stated on page 543,

> "Although plaintiff submitted his case on humanitarian negligence, this appears to have been a misadventure brought about by a mistake in legal theory rather than an abandonment of primary negligence assignments to secure strategic advantage. . ."
>
> ". . . The furtherance of justice requires that a case should not be reversed without remanding unless the appellate court is convinced that the facts are such that a recovery cannot be had. . . ."

The above-referred case is one in which the law was known, the plaintiffs simply selected the wrong theory. It is respectfully submitted that Plaintiffs, Mr. and Mrs. Wellman, tried and made their case under the law as it existed in Missouri for many years. For the Plaintiffs to be denied their recovery by the application of a theory or principle that has not heretofore been applied in this State, must be the taking of property without due process of law. The Constitution of the State of Missouri in Article I, Section Ten provides "that no person shall be deprived of life, liberty or property without due process of law." The Plaintiffs must, in any event, be granted the opportunity to try their lawsuit with knowledge of all of the elements that they must prove and be granted the opportu-

nity to introduce evidence to make their case under all the elements as now required. To deny Plaintiffs this opportunity amounts to an arbitrary taking of their property without due process of law, by depriving them due process of law.

Likewise, and concerning the Constitution of the United States, the Fifth Amendment provides that no person shall be deprived of life, liberty or property without due process of law and, as is well known, the Fourteenth Amendment, Section One, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States; *nor shall any state deprive any person of life, liberty or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws."

Inasmuch as the Court applies the added elements for the first time, there has been no previous question of denial of property without due process of law for the plaintiffs had won their lawsuit by a jury verdict and Court judgment. The Plaintiffs believed that their case would be decided upon the law as first established in the State of Missouri in the Supreme Court in 1893 and reaffirmed as recently as 1965. Only when the Court added new elements heretofore not applied in Missouri, were the Plaintiffs placed in the position of having their property taken from them without due process of law, that is, having their judgment taken from them without the opportunity of producing proof to meet all of the

elements as now required. For this Court did not add the new elements never before applied and then remand the case to be tried in accordance therewith, this Court has applied new elements never before applied in this State and denied the Plaintiffs the right to prove their case with knowledge of all of the elements required and introducing evidence to meet all of the evidence as now required of it. As stated in *Saunders* v. *Shaw*, 37 Sup. Ct. Reporter, 638 (244 U.S. 317) where the Court stated,

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course, ordinarily, that would not be enough. *But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here.* . . . It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing, the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

We respectfully ask the consideration of this Court, that the Opinion as expressed by the three justices in the Minority Opinion be made the Majority Opinion or, in the alternative, that this case be remanded for a new trial so that the Plaintiffs be granted the opportunity to intro-

duce evidence with knowledge of all of the elements required.

Reeder, Griffin, Dysart & Taylor, P. C
By /s/ Roger W. Penner
1221 Baltimore Avenue
Kansas City, Missouri 64105
221-1464

Meyer, Smith, Bott & Perkins
By /s/ Joseph B. Bott
415 Argyle Building
Kansas City, Missouri
VI2-1490
Attorneys for Plaintiffs, Respondents

CERTIFICATE OF SERVICE

It is hereby certified that Defendant was served these Motions by delivering two copies thereof, with Suggestions, at the offices of Attorneys for Defendant, Jack Kilroy, of the firm Shughart, Thomson & Kilroy, 914 Commerce Building, 922 Walnut, Kansas City, Missouri 64106, Attorney for Defendant, Appellant, on this 21st day of December, 1973.

/s/ Roger W. Penner

APPENDIX E

CLERK OF THE SUPREME COURT
State of Missouri
Jefferson City, Missouri
65101

January 14, 1974

Mr. Roger W. Penner
1221 Baltimore—Room 812
Kansas City, Missouri 64106

In re: Lionel R. Wellman, et al vs. Pacer Oil Company—No. 56672

Dear Sir:

This is to advise the Court has this day entered the following order in the above-entitled cause:

"Respondents' motion for rehearing overruled."

Yours very truly,

/s/ Thomas F. Simon
Clerk

/GK

cc-

Mr. Joseph B. Bott, 415 Argyle Building, Kansas City, Missouri 64106

Mr. John M. Kilroy, 914 Commerce Bank Building, Kansas City, Missouri 64106

CLERK OF THE SUPREME COURT
State of Missouri
Jefferson City, Missouri
65101

January 17, 1974

Mr. Roger W. Penner
Reeder, Griffin, Dysart & Taylor, P.C.
1221 Baltimore Avenue
Kansas City, Missouri 64105

In re: Wellman et al. vs.
Pacer Oil, No. 56672

Dear Mr. Penner:

In reply to your inquiry of January 15th, the Court has directed me to advise you that it considered the request for a remand as a part of the motion for rehearing and that the entire motion, including the request for remand, was overruled.

Yours very truly,

/s/ Thomas F. Simon
Clerk

TFS/vhg

JUL 28
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6360

LIONEL R. WELLMAN and BETTIE WELLMAN,
Petitioners,

vs.

PACER OIL COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

JOHN M. KILROY
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INDEX

Opinions Below 1

Statement of the Case 2

The Petition for a Writ of Certiorari Should Be Denied 3

Conclusion 13

Case Citations

Allen v. *Arguinbau*, 198 U.S. 149, 49 L.Ed. 990, 25 S.Ct. 622 (1905) 7

Allen v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 460 (Mo. 1963) 5

Edelman v. *California*, 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953) 5

Haehl v. *Wabash R. Co.*, 119 Mo. 225, 24 S.W. 737 (1893) 7, 8

Helis v. *Ward*, 308 U.S. 365, 84 L.Ed. 327, 60 S.Ct. 283 (1939) 4, 5

Honeyman v. *Hanan*, 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 350 (1937) 6

Hulbert v. *City of Chicago*, 202 U.S. 275, 50 L.Ed. 1026, 26 S.Ct. 617 (1906) 5

Irwin v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 452 (Mo. 1963) 5

Jankowich v. *Toll Road Comm'n*, 379 U.S. 487, 13 L.Ed. 2d 439, 85 S.Ct. 493 (1965) 6

Leath v. *Weaver*, 202 S.W. 2d 125 (Mo. 1947) 5

Lynch v. *New York*, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934) 6

Mutual Life Insurance Co. v. *McGrew*, 188 U.S. 291, 47 L.Ed. 480, 23 S.Ct. 375 (1903) 5

Panjwani v. *Star Service and Petroleum Co.*, 395 S.W. 2d 129 (Mo. 1965) 7, 8
Saunders v. *Shaw*, 244 U.S. 317, 61 L.Ed. 163, 37 S.Ct. 638 (1917) 3, 4, 5
Wellman v. *Pacer Oil Co.*, 504 S.W. 2d 55 (Mo. 1973) ..1, 7, 8
Wood Mowing & Reaping Machine Co. v. *Skinner*, 139 U.S. 293, 35 L.Ed. 193, 11 S.Ct. 528 (1891) 6-7

OTHER AUTHORITIES

Rule 19, Rules of the Supreme Court of the United States 13
Rule 23(f), Rules of the Supreme Court of the United States 5

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6360

LIONEL R. WELLMAN and BETTIE WELLMAN,
Petitioners,

vs.

PACER OIL COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

OPINIONS BELOW

Respondent concurs in petitioners' statement of opinions below but calls to the Court's attention that the Opinion of the Supreme Court of Missouri, en banc, was reported in 504 S.W. 2d 55.

STATEMENT OF THE CASE

Respondent takes issue with the petitioners' statement of the case and deems it necessary to correct omissions therein.

This cause was filed, tried and argued on appeal solely on the theory of respondeat superior. The petitioners were awarded a judgment in trial against defendant, Gamble, and that judgment is final.

There was no evidence to indicate that defendant, Pacer Oil Company, knew or had any reason to believe that Gamble was a person of violent tendencies at any time prior to the occasion in issue. Neither the defendant, Pacer Oil Company, nor its station manager, Clarke, knew that employee, Gamble, was carrying a gun.

The appeal in this case was first argued in Division One of the Supreme Court of Missouri, and was then transferred to the Court, en banc, which heard arguments and decided the case. The Federal question sought to be reviewed was not raised in the petitioners' brief, or in oral argument, but was raised for the first time in the petitioners' motion for rehearing. The issue of whether the petitioners could produce any evidence that defendant, Pacer Oil Company, knew or had any reason to believe that its employee, Gamble, was a person of violent tendencies was also raised for the first time in the petition for rehearing.

The facts which respondent has added to petitioners' statement of the case are set forth by the Supreme Court of Missouri in its statement of facts in its Opinion.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

I.

The Supreme Court of Missouri Did Not Deprive Petitioners of Any Rights in Contravention of Saunders v. Shaw, 244 U.S. 317, 61 L.Ed. 163, 37 S.Ct. 638 (1917), or Helis v. Ward, 308 U.S. 365, 84 L.Ed. 327, 60 S.Ct. 283 (1939); and Those Citations Relied upon by Petitioners Are Completely Inapplicable to This Cause

The petitioners, relying upon *Saunders* v. *Shaw*, 244 U.S. 317, 61 L.Ed. 163, 37 S.Ct. 638 (1917), contend that the Supreme Court of Missouri deprived them of due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States by refusing to grant them a new trial.

The case of *Saunders* v. *Shaw*, supra, has no application to this case. There, the trial court excluded certain evidence as inadmissible under the pleadings; but on appeal, the Supreme Court of Louisiana, in reversing the judgment, based its reversal upon the same evidence which had been excluded by the trial court. That case holds that a state Supreme Court can not reverse a lower court decision on facts not in evidence. Here, however, the Supreme Court of Missouri did not in any way utilize facts not in evidence in its decision. Additionally, petitioners made no offer of proof at the time their evidence was rejected.

The petitioners attempt to leave the impression that the appellate decision in this case was based upon the denial of their right to offer certain evidence in the trial

court to bring them within the rule of *Saunders* v. *Shaw*, supra. They have done this by citing portions of the Opinion out of context so that it may appear that what the Court specifically declared was not in issue, was in fact an issue in the decision. Their entire case, from its filing to the point of the appellate decision, was premised solely upon respondeat superior. The transcript of the trial shows that the petitioners were given every opportunity to offer evidence on each issue which they had pleaded.

The petitioners also cite *Helis* v. *Ward*, 308 U.S. 365, 84 L.Ed. 327, 60 S.Ct. 283 (1939), and state that the Supreme Court declined to order a new trial in that case only because the petitioner failed to seek a new trial in his motion for rehearing. But respondent submits that a new trial was requested in petitioners' motion for rehearing in *Helis* v. *Ward*, supra. This court then granted a writ of certiorari. Thereafter, upon oral argument, it became clear that the petitioner's basis for seeking a new trial rested upon entirely different grounds than were set forth in his petition for rehearing or in his petition for a writ of certiorari. For that reason, this Court declined to order a new trial in the case, stating, "Due process of law is not concerned with mere afterthoughts." There is nothing in the opinion of *Helis* v. *Ward*, supra, which justifies review by this Court herein.

The petitioners were satisfied with their theory of the case, and with the evidence which they produced, at trial. When the Supreme Court of Missouri, en banc, reversed the judgment of the trial court and directed entry of judgment in favor of this respondent, the petitioners then apparently decided that they desired to have another chance with a different theory, and a different trial approach. Their theory of the case, and the evidence which

they produced at trial in support of that theory, was a matter of trial technique and does not bring this case within the rule of *Saunders* v. *Shaw*, supra, or *Helis* v. *Ward*, supra.

II.

Since the Petitioners Did Not Properly Raise Their Claimed Federal Question in Accordance with the State Law, There Is No Issue for Review by This Court

The petition filed does not reflect when or how the constitutional issue now presented to this Court was first raised, as required to be shown under Rule 23(f), Rules of the Supreme Court of the United States. That issue was raised when the petitioners filed their petition for rehearing in the Supreme Court of Missouri. Under Missouri law, new issues not submitted in the original briefs and raised for the first time after the opinion is handed down, which are clearly afterthoughts, will not be considered on a motion for rehearing. *Irwin* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 452, 458 (Mo. 1963); *Allen* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 460, 467 (Mo. 1963); *Leath* v. *Weaver*, 202 S.W. 2d 125, 131-132 (Mo. 1947). Since the petitioners did not properly raise their claimed Federal question in accordance with the requirements of state law, this Court is without jurisdiction to decide whether constitutional rights have been violated. *Edelman* v. *California*, 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953); *Saunders* v. *Shaw*, supra; *Hulbert* v. *City of Chicago*, 202 U.S. 275, 50 L.Ed. 1026, 26 S.Ct. 617 (1906); *Mutual Life Insurance Co.* v. *McGrew*, 188 U.S. 291, 308, 47 L.Ed. 480, 23 S.Ct. 375 (1903).

III.

Since the Decision of the Supreme Court of Missouri Rests upon State Grounds Adequate to Support Its Judgment, There Is No Issue for Review by This Court

The Petition for Rehearing filed in the Supreme Court of Missouri raised more than the constitutional issue now relied upon. That Petition for Rehearing, set forth in Appendix D of the Petition for a Writ of Certiorari, called the attention of the Missouri Supreme Court to alleged material matters of fact overlooked or misinterpreted by the Court in its Opinion. It set forth five separate grounds in subparagraphs (a) through (e), inclusive, none of which raised any Federal constitutional issue. In their Alternate Motion to Remand for a New Trial, the petitioners set forth three separate grounds, (a) through (c), only one of which raised a Federal question.

It is a well-established principle of the Supreme Court of the United States that where the judgment of the state court rests upon more than one ground, one of which is Federal, and the others non-Federal in character, that jurisdiction of the United States Supreme Court fails if the non-Federal grounds are independent of the Federal ground and adequate to support the judgment. Here the noncompliance with state law, in not seasonably raising the Federal issue, is alone an adequate ground for the decision below. Likewise, the state court's determination of the other non-Federal issues raised is also adequate ground for the decision. *Jankovich* v. *Toll Road Comm'n*, 379 U.S. 487, 489, 13 L.Ed. 2d 439, 85 S.Ct. 493 (1965); *Lynch* v. *New York*, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934); *Honeyman* v. *Hanan*, 300 U.S. 14, 18, 81 L.Ed. 476, 57 S.Ct. 350 (1937); *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U.S.

293, 297, 35 L.Ed. 193, 11 S.Ct. 528 (1891); *Allen* v. *Arguinbau*, 198 U.S. 149, 154-155, 49 L.Ed. 990, 25 S.Ct. 622 (1905).

IV.

The Decision of the Supreme Court of Missouri, En Banc, Is Not a Change in the Law of Respondeat Superior

The petitioners' suggestion that the decision of the Missouri Supreme Court somehow drastically changed the law in that state as it had existed for a period of years is without merit.

In Missouri, as elsewhere, the employer is not absolutely liable for the acts of his employees. The employer has always been held responsible for damages sustained by reason of the acts of his employees, but only if they were committed both in the course and in the scope of employment. The decision in this case did not change the law.

The Supreme Court of Missouri had before it in this case a factual picture far different than had been presented in the prior cases of *Haehl* v. *Wabash R. Co.*, 119 Mo. 225, 24 S.W. 737 (1893) and *Panjwani* v. *Star Service and Petroleum Co.*, 395 S.W. 2d 129 (Mo. 1965). It specifically distinguished both of those decisions as factually different. The Court stated, ". . . It may be that *Haehl* is distinguishable from our decision in this case on the theory that the railroad should have anticipated that their watchman might use unnecessary violence in the performance of his duties . . . ." and ". . . while the facts in *Panjwani* differ from those in the case at bar, . . ." *Wellman* v. *Pacer Oil Co.*, supra, at 60. The Missouri Supreme Court held in this case that the actions of the employee, Gamble, "were so out-

rageous and criminal - so excessively violent as to be totally without reason or responsibility - and hence must be said, as a matter of law, not to be within the scope of his employment." *Wellman* v. *Pacer Oil Co.*, supra, at 58. This is particularly true when the employer did not even know he had a weapon.

In deciding this cause, the Supreme Court of Missouri adopted applicable sections of the Restatement of Agency and certain judicial decisions which had been the law for many years in other jurisdictions. Those decisions and the sections from the Restatement of Agency, were cited in the briefs of the parties and discussed in the oral arguments on appeal.

The basic legal principles in the two prior Missouri decisions, *Haehl* and *Panjwani*, supra, cited by petitioners, and those enunciated in the Opinion of the Missouri Supreme Court, remain the same. A factual situation involving violence so outrageous in the context of scope of employment simply had not confronted the Missouri appellate courts prior to this cause. Some consideration has always been given by the courts of Missouri, and elsewhere, to the nature of the act complained of contrasted with the work and duties normally performed by the employee.

It should be noted that *Haehl* and *Panjwani*, supra, were decided by divisions of the Missouri Supreme Court, not by the full court as in this cause. Further, those cases, while distinguished from this case, have not been overruled and are still the law of Missouri. They are still applicable to respondeat superior cases where the conduct of the employee is not so outrageous and totally without reason or responsibility as to bring it within the holding in this case.

V.

The Petitioners Were Not Denied the Right to Prove Any Aspect of Their Case and Have Misconstrued the Holding and Issues Involved

Unfortunately, the petitioners have misread or misunderstood the Opinion of the Supreme Court of Missouri. In their "Reasons Relied On For The Allowance Of The Writ," they have, on several occasions, quoted out of context the holding of the Supreme Court of Missouri, which a careful reading of that Opinion will clearly reflect.

Respondent hesitates to burden this Court, but feels compelled to point out herein the several times when petitioners have taken out of context portions of the Opinion of the Supreme Court of Missouri. This is apparently done by petitioners in an effort to leave the impression with this Court that they were erroneously denied the admission of evidence by the trial court.

In the very first paragraph on page five, designated "(a)", petitioners have technically misquoted the majority opinion of Judge Holman by stating that the opinion was based upon "the application of a theory or principle that has not heretofore been applied in Missouri." What Judge Holman actually said was, ". . . we have decided that this case should be ruled upon a theory or principle that has not heretofore been *expressly* applied in this state." (Emphasis added). The deletion of the word "expressly" from petitioners' statement of the majority opinion leaves an entirely different impression than was intended by the Court in that Opinion.

Next, in the second paragraph on page five, petitioners purport to set out the holding of the case and the reason therefor by stating:

> "The Supreme Court of Missouri reversed the judgment of the trial court by finding that the act of the employee in charge, Gamble, was outrageous and criminal and that the employer cannot be liable *inasmuch as there was no evidence to indicate that the employer knew or had reason to believe that Gamble was a person of violent tendencies at any time prior to the occurrence in question. . . .*" (Emphasis added).

The first part of the above quotation from the petition filed in this Court is a correct statement of the holding of the Supreme Court of Missouri. The remainder of that sentence (the part which is italicized for emphasis) is completely out of context. The decision was not based on whether or not Gamble had violent tendencies, or the absence of evidence therefor, as that issue was not raised in the pleadings. The Supreme Court of Missouri simply stated in its Opinion that whether or not Gamble was a person of violent tendencies, was not an issue in the case. The petitioners put a portion of the Court's statement of facts with regard to what was not an issue in the case with a portion of the holding of the case, to make it appear that the decision was based upon facts not even in issue.

The attempt of petitioners is further illustrated by reference to the quotation set forth at the bottom of page five and the top of page six of their petition. Petitioners' quotation was part of the Court's statement of facts, but, as set out, leaves an impression that there is a holding on whether Gamble was a person of violent tendencies. Alleged negligent hiring, or the vicious propensity of the employee, was never pleaded in this case and never claimed at any time throughout the trial or on the appeal. Peti-

tioners first raised that issue in their petition for rehearing. It is therefore incorrect for petitioners, consciously or unconsciously, to leave the impression that the decision of the Supreme Court of Missouri was somehow based upon an issue of alleged violent tendencies of the employee, when in fact, that was not an issue for the Court on appeal.

Following a quotation from page eight of the Opinion (page six of the plaintiff's petition herein), again taken from the Court's statement of facts, which indicated the Court was not deciding the vicious propensities issue, petitioners state, "So saying, the Supreme Court of Missouri reversed the judgment of the trial court. . . ." This again leaves the erroneous impression that the Supreme Court reversed the judgment of the petitioners based upon what is set forth in the preceding quotation from the statement of facts. This simply is not true as that issue was not involved.

Illustrative of how far the petitioners have gone is evidenced by their effort to contend that they were denied the right to introduce evidence during trial on the non-issue of alleged violent tendency of an employee. The trial court sustained objections to such proffered evidence, and properly so, because it was not then being claimed by petitioners as a ground of liability of Pacer Oil Company. No offer of proof was made as required by law and no request was ever made to amend the pleadings. Furthermore, this is a completely false issue because the trial transcript shows that the depositions of the manager of the service station as well as the Vice President of Pacer Oil Company were taken, and that none of that testimony showed that Pacer Oil Company had any knowledge of any alleged violent tendencies of Gamble, if, in fact, there were any.

If petitioners could have developed such evidence, they would have done so and would have pleaded and tried the case on that issue. Failing to do so, they now seek to use it as a route to give them another trial. Having not pleaded the issue of alleged violent propensities, having failed to develop any evidence to substantiate the same, and having raised that issue for the first time in their petition for rehearing, petitioners, nevertheless, now contend that they were denied a new trial on excluded evidence on an issue not then claimed, which was not then admissible, and which they could not prove if they had claimed it.

Finally, on page eight of the petition herein, petitioners state they attempted to introduce evidence at trial that "defendant, Pacer Oil Company, would have hired employee, Gamble, even if it had known he was a convicted criminal, to say nothing of tendencies to violence." This is a misstatement of the trial record. The plaintiff's efforts to inquire into whether Pacer Oil Company would have hired Gamble even if he had a criminal record was a hypothetical question and was properly excluded on objection because it was not relevant to the pleaded issues of respondeat superior. There was no evidence, actual, or offered and refused, of supposed "convictions" or of "violent tendencies".

CONCLUSION

Under the provisions of Rule 19, Rules of the Supreme Court of the United States, this Court has set forth the types of cases which may, in its discretion, call for the issuance of a writ of certiorari. For each and all of the reasons set forth above, respondent submits that the petitioners have failed to show that the decision of the Supreme Court of Missouri in this cause presents any question to be settled by this Court.

Respectfully submitted,

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